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**IN THE
COURT OF APPEALS OF INDIANA**

W.H.,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 20A03-0610-JV-492
)	
STATE OF INDIANA,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0608-JD-799

June 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

W.H. appeals the juvenile court's order adjudicating him to be a delinquent and ordering that he be placed in a residential treatment facility. He raises the following two restated issues:

- I. Whether there is sufficient evidence to support his adjudication; and
- II. Whether the juvenile court abused its discretion in ordering that he be placed in a residential treatment facility.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the adjudication reveal that on July 22, 2006, J.P., D.L., A.S., and D.K.L. attended W.H.'s thirteenth birthday party, which included an overnight campout in three tents set up in W.H.'s backyard. During the night, W.H. inserted his penis into twelve-year-old A.S.'s anus despite A.S.'s cries and resistance. J.P. heard A.S.'s cries from another tent where he was being molested by W.H.'s brother.

Earlier in the night, D.L. had seen W.H. trying to make A.S. suck W.H.'s penis. W.H. had also asked D.L. to suck his penis, but D.L. refused. The following morning, W.H. told D.L. that if they told anyone what had happened during the party, they would get stabbed.¹ This statement put D.L. in fear.

The State sought to have W.H. adjudicated as a delinquent for committing child molesting as a Class B felony and intimidation as a Class D felony if committed by an adult. Following the hearing, the juvenile court specifically found the testimony of victim A.S. to be credible, and the testimony of W.H. to lack consistency and credibility. The court

adjudicated W.H. to be a delinquent as alleged in the delinquency petition, and referred him to Holy Cross Counseling Group for a psychosexual assessment, including recommendations for placement.

The social worker that completed the assessment concluded that W.H.'s sexual behaviors were "planned and predatory." *Appellee's App.* at 14. The social worker also expressed her concern that W.H.'s caregivers have a history of alcohol abuse, criminal mischief, and domestic battery. The social worker concluded that W.H. presented a risk to the community and should be placed in a residential treatment program. After a dispositional hearing, the court followed the social worker's recommendations and ordered W.H. to be placed in a residential treatment program. W.H. appeals his adjudication and placement.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

When the State seeks to have a juvenile adjudicated a delinquent, it must prove every element of the offense beyond a reasonable doubt. *D.B. v. State*, 842 N.E.2d 399, 401 (Ind. Ct. App. 2006). On review, we will not reweigh the evidence or judge the credibility of the witnesses. *Id.* Rather, we look to the evidence and the reasonable inferences therefrom that support the adjudication. *Id.* We will affirm it if evidence of probative value exists from which the fact finder could find the juvenile guilty beyond a reasonable doubt. *Id.* at 401-02. In other words, we will affirm the finding of delinquency unless it may be concluded that no reasonable fact finder could find the elements of the crime proven beyond a reasonable

¹ At the fact finding hearing, D.L. responded as follows when asked if anything else happened with W.H.: "[W.H.] said that if . . . we tell anyone, we will get stabbed." *Transcript* at 66.

doubt. *Id.* at 402.

A. Child Molesting

With respect to the child molesting charge, the delinquency petition alleges as follows:

[O]n or about July 22, 2006 . . . one [W.H.] did . . . cause a male minor child under fourteen (14) years of age, to-wit: one [A.S.], 12 years of age, to perform or submit to sexual intercourse or deviate sexual conduct, to wit: anal sexual intercourse; all of which is contrary to the form of I.C. § 35-42-4-3

Deviate sexual conduct is an act involving the sex organ of one person and the mouth or anus of another person. I.C. § 35-41-1-9.

Here, W.H. committed deviate sexual conduct when he placed his penis into A.S.'s anus. Nevertheless, W.H. complains that the petition alleges that he committed anal sexual intercourse. Indiana Code Section 35-41-1-26 defines intercourse as an act that includes any penetration of the female sex organ by the male sex organ. According to W.H., because he and A.S. are both males, anal sexual intercourse could not have occurred. However, under the facts and circumstances of this case, the word sexual placed between the words anal and intercourse is mere surplusage, which did not prejudice W.H. We find no error.

W.H. further argues there is insufficient evidence to support his adjudication because only A.S. and D. L. testified that A.S. was in the tent alone with W.H. This argument is a request that we reweigh the evidence, which we cannot and will not do. *See D.B.*, 842 N.E.2d at 401.

B. Intimidation

Indiana Code Section 35-45-2-1 provides that a person who communicates a threat to another person with the intent that the other person be placed in fear of retaliation for a prior

lawful act commits intimidation. Here, W.H. told D.L. that if they told anyone what had happened during the party, they would get stabbed. W.H. complains that there is insufficient evidence to support the adjudication as a delinquent because his statement to D.L. was not a threat.

A threat is an expression, by words or action, of an intention to unlawfully injure the threatened person. I.C. 35-45-2-1(c)(1). Whether a particular communication constitutes a threat is an objective question for the trier of fact. *Ajabu v. State*, 677 N.E.2d 1035, 1041 (Ind. Ct. App. 1997), *trans. denied*.

Here, D.L. refused to suck W.H.'s penis. Later that night, D.L. saw W.H. trying to make A.S. suck his penis. The following morning, W.H. told D.L. they would be stabbed if they told anyone what had happened the night before at the party. This statement placed D.L. in fear. This evidence supports the juvenile court's finding that W.H.'s statement to D.L. was a threat. W.H.'s argument is another request that we reweigh the evidence, which we cannot do. *See D.B.*, 842 N.E.2d at 401. We find sufficient evidence to support W.H.'s adjudication as a delinquent.

II. Disposition

W.H. also argues that the juvenile court erred in ordering that he be placed in a residential treatment facility because this disposition is not consistent with the statutory requirement that a disposition be the least restrictive alternative.

The choice of the specific disposition of a juvenile adjudicated to be a delinquent child is a matter within the discretion of the juvenile court and will be reversed if there has been an abuse of that discretion. *Id.* at 404. The juvenile court's discretion is subject to the statutory

considerations of the welfare of the child, the safety of the community, and the policy of favoring the least harsh disposition. *Id.* An abuse of discretion occurs when the juvenile court's action is clearly erroneous and against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* at 404-05.

Indiana Code Section 31-37-18-6 provides that if consistent with the safety of the community and the best interest of the child, the juvenile court shall enter a dispositional decree that is in the least restrictive and most appropriate setting available. We have previously noted that this section requires the juvenile court to select the least restrictive placement in most situations. *Id.* at 405. The statute requires placement in the least restrictive setting only if such a placement is consistent with the safety of the community and the best interest of the child. *Id.* In other words, the statute recognizes that in certain situations the best interest of the child is better served by a more restrictive placement. *Id.* at 406.

Here, our review of the record reveals that W.H. threatened one guest at his birthday party and molested another. The social worker that completed a psychosexual assessment on W.H. concluded that W.H.'s sexual behaviors were "planned and predatory." *Appellee's App.* at 14. The social worker also stated that one of her major concerns was the instability of W.H.'s caregivers, who have a history of alcohol abuse, criminal mischief, and domestic violence. The social worker concluded that W.H. is a "sexualized youngster that presents a risk to the community. His amenability to treatment is moderate due to his lack of honesty, self-disclosure, and family stability." *Id.* at 15. Based on the information presented, the

social worker recommended that W.H. be placed in a residential treatment program. Under these circumstances, the juvenile court's decision was not an abuse of discretion.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.